SUPREME COURT, U. S.

In The

OCT 3 1974

Supreme Court of the United States

October Term 1973

No. A-1331

IN THE MATTER OF JOHN E. GOODRICH,

Petitioner.

v.

SOUTH DAKOTA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 3

Statutes and Rules Involved 8

Statement of the Case 9

Statement of the Facts 9

I. Petitioner's Disbarment 9

II. Ferguson Bond 13

III. Violation of Purpose of Trust 13

IV. Failure to Return Money 14

Reasons for Granting the Writ 19

Certificate of Service 25

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Ex parte Garland, 4 Wall 333, 380, 18 L. Ed. 366 23

Green v. McElroy, 360 U.S. 474, 492, 496-497, 79 S. Ct. 1400, 1411, 1413, 3 L. Ed. 2d 1377 6

In re Goodrich, 216 N.W. 2d 557 17

In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed 682 23

In re Ruffalo, 390 U.S. 554, 88 S. Ct. 1222 (1968) 24

Randall v. Brigham, 7 Wall 523, 540, 19 L. Ed. 285 23

Selling v. Radford, 243 U.S. 46, 37 S. Ct. 377, 61 L. Ed. 585 . 22

Spevack v. Klein, 385 U.S. 511, 515, 87 S. Ct. 625, 17 L. Ed. 2d 575 23

Willner v. Committee on Character and Fitness etc., 373 U.S. 96, 83 S. Ct. 1175 6

Contents

Page

Statutes Cited:

United States Code, Title 28, Section 1257 ..... 2, 8

South Dakota Compiled Laws, 1967 annotated, Title 16 8

Title 42, Chapter 21, U.S.C. Civil Rights Act 16

United States Constitution Cited:

Fifth Amendment 3, 8, 17

Sixth Amendment 17

Fourteenth Amendment 3, 8, 17

Other Authorities Cited:

Constitution of the State of South Dakota, Paragraphs 2 and 7 ..... 8, 17

The Canons of Professional Ethics of the State Bar of South Dakota (1968) — Canon 11 ..... 5, 8, 22

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IN THE MATTER OF JOHN E. GOODRICH

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

The petitioner herein, John E. Goodrich, by and through his undersigned attorney, respectfully pray this Honorable Court to issue a writ of certiorari to review the judgment of the Supreme Court of South Dakota entered on the 1st day of April, 1974, and the order of the same Court denying his timely petition for rehearing entered on the 7th day of May, 1974.

OPINIONS BELOW

The three judge majority opinion and two judge dissent opinion is found in Appendix A and order denying a rehearing is found in Appendix B.

JURISDICTION

The judgment of disbarment in the Supreme Court of the State of South Dakota was entered on April 1, 1974. A petition for rehearing was filed on April 19, 1974, and the order denying the petition for rehearing was entered on May 7, 1974. On July 19, 1974, petitioner filed, by counsel, an application to the Supreme Court of the United States for an extension of time to file the petition for a writ of certiorari. On July 22, 1974 the Supreme Court of the United States granted an extension directing that the petition for a writ of certiorari be filed on or before October 3, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

QUESTIONS PRESENTED

I. Where a State Supreme Court exercising original jurisdiction in a disbarment proceeding enters an order disbarring an attorney which decision is grounded upon allegations that were not charged in the original complaint for disbarment, and fails to give the attorney any notice or opportunity to be heard on said allegations and grounds at any time before or after the order of disbarment is entered, is such a procedure constitutionally impermissible and in violation of the attorney's right to due process?

II. On October 10, 1969 an unverified complaint regarding petitioner's failure to return certain money that was given for bail bond purposes was referred for investigation to the State Attorney General's office pursuant to the South Dakota statutes. On August 26, 1970, after a full disclosure by the petitioner of the facts and after investigation by the Grievance Committee of the State Bar of South Dakota the matter was resolved in petitioner's favor. On January 19, 1972, after the original complainant and other material witnesses had died and another witness had moved to Australia, the Supreme Court of South Dakota on their own motion ordered the Attorney General to prepare a formal complaint on the matter in question.

III. Does renewal of charges previously dismissed after almost three years has elapsed, during which period of time the complainant and other material witnesses have died and other witnesses have left the country, deprive the petitioner of his constitutional rights to confront witnesses and secure evidence in his defense and deny petitioner due process under the Fifth and Fourteenth Amendments of the Constitution of the United States?

The dissenting opinion of Justice Dunn and Justice Winans sets out the facts on which petitioner contends that his constitutional rights to due process has been violated and his constitutional right to confront witnesses has been prejudiced by the delay and resurrection of the charges in this matter.

Justice Dunn stated:

> "The Ferguson case was investigated by the Grievance Committee some three years ago on the Complaint of John Ferguson. Following a full disclosure of the handling of the accounts, John Ferguson withdrew his complaint. Dr. James Ferguson moved back to Australia and John Ferguson died. The file of the Grievance Committee was closed.
>
> Upon a second Complaint being filed in 1972, in the Bosanco case, which the referee heard and found to be 'not proven', the Ferguson case was resurrected and now is the basis of John Goodrich's disbarment. If the Ferguson case was to be the basis of disbarment, it should have been prosecuted in 1971 when the Fergusons were available to testify. The renewal of these charges after almost three years have elapsed denies to Mr. Goodrich very fundamental rights. I must respectfully dissent."

Justice Winans in his dissenting opinion states:

"I concur in the dissent of Justice Dunn. Also I am in agreement with the majority that our disbarment procedures are constitutional. I would add but a short statement as background. The referee made rather short shrift of the Bosanco charge and I think he was correct in so doing. Whatever Complaint was originally made by Dr. Ferguson, or his brother John, or both against John Goodrich appears to have been completely adjusted and settled among themselves. This is born out by exhibit signed by Dr. Ferguson on the date of June 16, 1971. It also appears that nearly one year earlier the Office of the Attorney General of the State of South Dakota, by a letter addressed to the Chairman of the South Dakota Grievance Committee, dated August 26, 1970, was likewise satisfied with the explanation and showing made by Goodrich, through his attorney, of his conduct then under investigation. The last paragraph of the Attorney General's letter concludes with this statement: 'Unless this office is notified by either the Grievance Committee or the South Dakota Supreme Court that further action or investigation is required by the Attorney General, we will close our file in this case.' What I believe we have in this proceeding against Mr. Goodrich is a highly technical possible violation in a super sensitive vindication of Canon 11 of Professional Ethics of the State Bar of South Dakota in force and effect in 1968

> as set forth in the Court's opinion. I do not believe that the following language of such opinion is either justified or warranted by the record: . . . 'and which $1,900 was procured through accused's deceit, fraud and misrepresentation.' These are serious charges, the same on which the Attorney General had previously closed his files. I think the majority opinion goes too far at too late a date. For these reasons, I dissent from the judgment of outright disbarment in this case."

In *Willner v. Committee on Character and Fitness, etc.*, cited as 373 U.S. 96; 83 S. Ct. 1175, the Court stated:

> "We have emphasized in recent years, that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood."

See *Green v. McElroy*, 360 U.S. 474, at page 492, 496-497, 79 S. Ct. 1400, 1411, 1413, 3 L. Ed. 2d 1377, and cases cited.

That view has been taken by several state courts when it comes to procedural due process and admission to practice law. In the instant case the majority opinion of the Court stated that they had considered the constitutional questions and the constitutional claims raised by the accused and found them without merit. From reading the dissent it is apparent that one of the constitutional claims which the Court considered was that the failure of the Supreme Court and or the Attorney General to prosecute the Ferguson case in 1971 when the Fergusons were

available to testify raised an issue as to whether such procedure denied to Mr. Goodrich very fundamental rights. The majority apparently felt that it did not. The dissent, however, clearly felt that Mr. Goodrich was denied fundamental rights by the procedure and the delay occasioned in the Ferguson matter. The record is devoid of any reasonable basis on which the delay was based. In fact, a reading of the record clearly indicates that the Ferguson case was thrown in along with the Bosanco matter as another arrow in the Attorney General's quiver in the hope that one of his arrows would reach its mark.

Not being satisfied with these two charges, the Attorney General then at the proceedings did effectively bring in a new matter that is the alleged misconduct of the petitioner involving the $1,900 received from the defense fund. The referee then not being satisfied with the evidence that was presented before him then in addition made an ex parte investigation into the Court files regarding the original Dr. Ferguson criminal charges pertaining to the bond issue, and further made an ex parte investigation of Mr. Goodrich's previous disbarment on another matter and reported all such findings in his report and introduced exhibits which were styled Referee Exhibit 1 and 2. All such investigation was done without the knowledge of Mr. Goodrich nor his attorney and were first noticed in the report filed by the referee. It is contended that the procedure followed in the instant case against petitioner denying the petitioner very fundamental rights as stated by Justice Dunn. The unexplained delay in resurrecting the Ferguson charges after the complainant and other witnesses had left the country deprived the petitioner of his constitutional right to be confronted by his alleged

accusers. In fact, in the instant case, it is clear from reading the Court's opinion that the petitioner had no accuser and that John Ferguson withdrew his complaint after the previous disclosure of the handling of the accounts. In fact, there was no accuser in regards to the instant charge.

Had the hearings been held when John Ferguson was alive, it is conceivable that he would have testified that there was no wrongdoing and that he was satisfied with the services of the petitioner. Thus petitioner contends that by the delay which is evidenced from the record in this case, the petitioner not only was denied an opportunity to confront alleged accusers but he was denied an opportunity to have his alleged accuser completely vindicate his actions regarding the bond money and thus denied an opportunity to secure evidence in his defense.

The procedure followed and as supported by the record and the decision of the Court shows that the petitioner has been denied fundamental rights and that he has been denied an opportunity to call and present evidence in his favor, and been denied an opportunity through the delay which was not occasioned by any fault of the petitioner to vindicate his conduct by the very people that were involved in the transaction.

STATUTES AND RULES INVOLVED

United States Constitution, Fifth, Sixth and Fourteenth Amendments; Title 28 United States Code, Section 1257; South Dakota Compiled Laws, 1967 Annotated, Title 16; The Canons of Professional Ethics of the State Bar of South Dakota (1968) — Canon 11; Constitution of the State of South Dakota, Paragraphs 2 and 7.

STATEMENT OF THE CASE

The petitioner was ordered indefinitely suspended from the practice of law by the Supreme Court of South Dakota on April 1, 1974. A petition for rehearing was denied on May 7, 1974. That order is final and is the subject of this petition.

STATEMENT OF THE FACTS

I.

Petitioner's Disbarment

In February 1968 the petitioner was retained to represent a Dr. James Smith Ferguson who was in jail on multiple criminal charges in South Dakota. In April 1968, Dr. Ferguson's brother, John Ferguson, a resident of Australia, sent to petitioner $25,000 to be used for bond and Dr. Ferguson's personal needs and living expenses. On April 11, 1968, the money was received and placed in the Lyman County Bank, Kennebec, South Dakota, in an account designated "J. Ferguson Special Bond Account." The record shows that checks out of the fund were given for Dr. Ferguson's living expenses with the consent of John Ferguson up to July 17, 1968 when the entire balance in the account was turned over to Dr. Ferguson at John Ferguson's direction. No allegation of any wrongdoing was claimed or proven regarding these disbursements. In addition, certain citizens who believed in Dr. Ferguson had established a defense fund and had raised $2,700 to be used for Dr. Ferguson's personal and legal expenses (Court Opinion, Appendix A (4a)). The defense fund was deposited in the Draper State Bank, Draper, South Dakota.

On April 11, 1968, the doctor's bond had been reduced to $20,000. On April 11, 1968, the petitioner contacted Mr. North, one of the persons in charge of the defense fund, and requested a check from the defense fund be delivered to him in the amount of $1,900 and requested it be made payable to the Clerk of the Court, Jones County, South Dakota.

On the same date, April 11, 1968, the petitioner drew a check from the Ferguson Bond Account for $18,100 payable to the Clerk of the Court, Jones County, South Dakota, and another check for $1,900 to cash, out of the Ferguson Bond Account. The petitioner on the same date then having $21,900 in his possession posted the $20,000 bond for Dr. Ferguson by paying the clerk with the $18,100 from the Bond Account and the $1,900 check from the defense account, both checks being cashier's checks. In reality, petitioner merely substituted the $1,900 cashier's check for the $1,900 cash when he posted the bond.

On July 17, 1968, John Ferguson of Australia ordered the control and remaining balance in the Bond Account be turned over to his brother, Dr. James Smith Ferguson, which was done. Approximately one year later all charges were eventually dismissed against Dr. Ferguson and the bond was released. The Clerk of the Court returned the $20,000 by check to the petitioner who on the same day endorsed and delivered the $20,000 check to Dr. Ferguson pursuant to previous instructions of John Ferguson.

The opinion of the Court found that the return of the $20,000 to Dr. Ferguson was done with the consent of John Ferguson and the Court found no misconduct by the petitioner in connection with this transaction (Court Opinion, Appendix A

(6a)). The complaint against petitioner had alleged a failure to return the money to John Ferguson but the evidence conclusively showed John Ferguson authorized petitioner to give the $20,000 to Dr. Ferguson.

The material facts leading to the disbarment resulted from the following proceedings: On or about July 30, 1969, Dr. James Smith Ferguson received the $20,000 when the bond was released, and sent approximately $18,223.16 back to his brother, John Ferguson in Australia. John Ferguson apparently complained that he should have received $20,000 and sent a letter to the Grievance Committee blaming the petitioner for the shortage. This letter was not introduced or made a part of the record in this proceedings. Pursuant to that complaint, the Grievance Committee of the State Bar of South Dakota and the Attorney General's Office of South Dakota instituted an inquiry as to any wrongdoing by petitioner. Petitioner appeared and fully submitted accountings, documents and fully explained the entire transaction regarding the matter. On August 26, 1970, the Attorney General's office reported to the Supreme Court of South Dakota:

> "Unless this office is notified by either the Grievance Committee or the South Dakota Supreme Court that further action or investigation is required by the Attorney General, we will close our file in this case" (Quoted in Court Opinion — Dissent Disbarment Opinion — Appendix A (12a)).

The Supreme Court did not take any further action at that time.

The Ferguson Bond question surfaced again in conjunction with an unrelated allegation against petitioner that while defending a client by the name of Bosanco he attempted in argument to mislead a jury concerning facts while defending Bosanco on a driving while drunk charge. This charge was ultimately dismissed.

As a result of the allegations involving the Bosanco case, the Supreme Court of South Dakota, on January 19, 1972, directed the Attorney General,

> "to prepare and file a formal complaint against the above named John Goodrich with reference to the alleged unprofessional conduct of said attorney and any other alleged unprofessional conduct of said attorney of which the Attorney General may be advised within twenty days from the date of this order."

On February 3, 1972, pursuant to the above direction the attorney filed a complaint against the petitioner regarding the Bosanco matter and apparently pursuant to the direction to file a complaint as to

> "any other alleged unprofessional conduct of said attorney of which the Attorney General may be advised,"

the attorney general resurrected the Ferguson charge (Order of January 19, 1972, Appendix C (14a); Complaint, Appendix D (16a)). No complaint was pending regarding the Ferguson matter. In fact, John Ferguson had died. Dr. Feguson had

moved to Australia. John Lindley who was the original investigating member of the Grievance Committee of the State Bar of South Dakota and who personally investigated the prior complaint had died.

The Attorney General, however, for reasons not apparent in the record resurrected the Ferguson matter and filed the following complaint in addition to the Bosanco matter. The material counts being as follows:

II.

Ferguson Bond

Dr. James Smith Ferguson, was arrested and confined in jail on certain criminal charges on or about the first part of 1968. In connection with these charges, Dr. Ferguson employed John E. Goodrich. Bail for the charges was set at $25,000. A draft in the amount of $25,000 was entrusted to John E. Goodrich by John Ferguson, Dr. James Smith Ferguson's brother, who resided in Brisbane, Australia. The sole purpose of the draft was to furnish a cash bail bond. The draft was deposited in the Lyman County Bank, now known as the United National Bank, in an account designated "J. Ferguson Special Bond Account." John E. Goodrich was the only one authorized to write checks on this account.

III.

Violation of Purpose of Trust

On or about April of 1968, Dr. James Smith Ferguson's bond was reduced to $20,000. On or about April 11, 1968, two (2) checks were written on the "J. Ferguson Special Bond

Account," one in the amount of $18,101, made out to the Lyman County Bank; and one in the amount of $1,900 made out to cash. The $20,000 bail was paid for by a Lyman County Bank cashier's check in the amount of $18,100 and a bank draft from the Draper State Bank in the amount of $1,900. Additional checks were written on the special account up until on or about July 17, 1968, leaving a balance in the account as of that date of $1,900, when John E. Goodrich completely relinquished control over the account and allowed checks to be written on it by Dr. James Smith Ferguson without the approval, control, or supervision of John E. Goodrich.

IV.

Failure to Return Money

On or about July 30, 1969, the appearance bond of $20,000 was released and a check in that amount was made out to "John E. Goodrich, Attorney" by the Clerk of Courts. The check was written on the Jones County State Bank of Murdo, South Dakota. John E. Goodrich cashed the check at the Draper State Bank in Draper, South Dakota, and exchanged it for two separate checks, one made out to the "John S. Ferguson Special Bond Account" in the amount of $18,100 and the other made out to "Delores Iversen and H. B. North" in the amount of $1,900. The check in the amount of $18,100 was deposited in the "J. Ferguson Special Account" at the Lyman County Bank. This money, together with the balance in the account, less transfer charges, or a total of $18,223.16 was returned to John Ferguson in Australia, the amount returned being $1,776.84 less than the amount of the bail bond money which was returned to John E. Goodrich.

Petitioner filed his answer to the complaint (Appendix D (16a)).

The complaint did not allege any unprofessional conduct or wrongdoing regarding the $1,900 received from the defense fund and no complaints had ever been made concerning money received from the defense fund nor was the complaint ever amended to include any charge.

At the hearing on the above complaint, Mrs. Iversen, who was involved with the defense fund, was called as a witness by the Attorney General and stated:

> "Q. And do you remember who came to you or how you were contacted about this. A. I believe Mr. Goodrich (the Petitioner) called Mr. North and Mr. North called me and asked me if I would be ready to go to Draper and get enough money and finish the bond" (Quoted in Opinion of the Court, Appendix A (5a)).

Mrs. Iversen's hearsay statement as to what Mr. North told her was the only material evidence presented on the $1,900 received from the defense fund.

After the evidence was taken the referee made findings of fact and recommendation to the Supreme Court of South Dakota, wherein for the first time it was alleged that the petitioner was guilty of wrongdoing regarding the $1,900 received from the defense fund. Petitioner filed objections to the referee's report.

Thereafter the petitioner filed a motion in the Supreme Court of South Dakota for an order remitting the matter back to the referee on the grounds that (1) the referee's decision weighs heavily on matters which were not brought up at the time of the trial; (2) that additional evidence be taken on the purpose for which the $1,900 received from the defense fund was collected and used; (3) that to deny the petitioner an opportunity to answer the above implications and findings denied him his rights under the Federal Constitution as well as the State Constitution of the due process of law. Attached to this motion were affidavits that the defense fund was created for legal fees, Dr. Ferguson's living expenses and those of his family (Appendix F (26a)). The Attorney General's office filed an answering affidavit that the purpose for which the defense fund and the $1,900 from said fund was used was without merit and in substance not material to the issue (Appendix G (37a)).

The Supreme Court of South Dakota refused to remand the case and a hearing was set on his objections for September 27, 1973.

Prior to the hearing, petitioner filed a complaint in the United States District Court, District of South Dakota, Northern Division, under Title 42, Chapter 21, U.S.C. Civil Rights Act. Therein petitioner again alleged among other grounds that (1) his constitutional right to due process was violated by the procedure in the South Dakota disbarment proceeding on the grounds that: (a) failure to prosecute the Ferguson Bond charge until after John Ferguson had died, Dr. Ferguson had moved to Australia, and other witnesses had died, effectively denied petitioner his right and ability to confront witnesses; (b) further such procedure denied him due process of law under the Fifth

and Fourteenth Amendment of the United States Constitution and paragraph two and seven of the Constitution of the State of South Dakota; (c) that the failure of the Court to remand the case back to the referee for a further hearing regarding the charges pertaining to the $1,900 received from the defense fund violated his due process rights.

In addition, petitioner asked the District Court to enjoin the State disbarment proceedings pending a hearing on his claims. The District Court on September 26, 1973 by oral order enjoined the Attorney General of South Dakota from proceeding in the State disbarment, scheduled on September 27, 1973. Pursuant to said injunction the Attorney General on September 27, 1973 informed the Supreme Court of South Dakota of the injunction and the Court entered an order reciting the Attorney General appeared but did not participate in the hearing on September 27, 1973.

The South Dakota Supreme Court proceeded without regard to the injunction and without the Attorney General's participation on September 27, 1973 (Order of September 27, 1973, Appendix H (41a)).

The petitioner thereafter by motions filed on February 19, 1974, requested all charges be dismissed and attached as grounds thereto the complaint filed in the United States District Court.

On April 1, 1974, the Supreme Court of South Dakota issued its disbarment order (Appendix I (43a)). The Court's opinion was filed on April 2, 1974 (Appendix A (3a)) (Reported 216 N.W. 2d 557). The majority Court opinion relied heavily on the premise that the petition secured $1,900 from the

defense fund by the accused deceit, fraud and misrepresentation, an allegation not charged in the complaint and which the petitioner was denied any opportunity to refute.

The Court recognized and denied the constitutional issues raised and its opinion stated:

> "Although the accused did not raise any constitutional questions in the hearing before the referee or in his objections to the referee's report, he did raise certain constitutional questions in his brief filed in this Court. We have considered those questions, together with his challenge to the constitutionality of our disbarment procedures, on their face and as applied to him in this proceeding, as set forth in his complaint in his action in United States District Court (see footnote 3, infra), and we have concluded that the Constitutional claims raised by accused are without merit."

The decision disbarring petitioner was a 3-2 split decision. Justice Dunn in his dissent stated that the renewal of these charges after almost three years have elapsed denies to Mr. Goodrich very fundamental rights.

Justice Winans' dissent stated:

> "I do not believe that the following language of such opinion is either justified or warranted by the record . . . and which $1,900 was procured through accused's deceit, fraud and misrepresentation . . . I think the majority opinion goes too far and at too late a date."

REASONS FOR GRANTING THE WRIT

A state court proceeding resulting in a final order disbarring an attorney which materially relies on charges of misconduct that was not charged in the original complaint or ever amended to put said charges in issue, and on which matters the attorney has not been given notice of any charge and further has been denied an opportunity for explanation and defense constitutes a denial of the attorney's constitutional right to procedural due process and said disbarment order ought to be vacated.

The petitioner contends the Court necessarily based its disbarment order on charges which petitioner had not been given notice of or alleged in the complaint for disbarment. Further, petitioner contends the decision of the Court not only relied on charges not alleged in the complaint but further the Court denied petitioner an opportunity for explanation or defense of said allegations. In support of this position, petitioner alleges that a comparison of the charges outlined in the complaint and the Court's opinion decreeing disbarment establishes that petitioner was denied procedural due process. The Court's opinion did not rely on the grounds set out in paragraph 2 of the complaint as a ground for disbarment. Paragraph 2 in substance alleged that the entire $25,000 sent by John Goodrich of Australia to petitioner was for the sole purpose of furnishing a cash bail bond. The evidence and the findings of the Court established that disbursements out of the $25,000 were made with the consent of John Ferguson for his brother's personal and living expenses. The allegations in paragraph 3 and 4 were not the basis of the disbarment order as is apparent in reading the Court's opinion. The thrust of the Court's finding was that petitioner received $21,900 which was

$1,900 in excess of the required $20,000 bond and the $1,900 was procured through accused deceit, fraud, and misrepresentation. The complaint does not charge any such allegation nor was the complaint amended to include any such allegation. The thrust of the disbarment order relied upon the occurrence that took place on April 11, 1968. On that date, petitioner received from John Ferguson $25,000 which was placed in the Lyman County Bank, South Dakota. On that same date, immediately after the money was received, the petitioner called Mr. North, one of the parties in charge of the defense fund which had been established for Dr. Ferguson's personal and legal expenses. On April 11, 1968 petitioner received $1,900 from the defense fund by bank draft and at his request was made payable to the Clerk of the Court. He withdrew $18,100 by check payable to the Clerk of the Court from the Ferguson account and withdrew cash in the amount of $1,900 from the same account. Petitioner had $21,900 in his possession on that date and immediately went to the Clerk of the Court and posted a $20,000 bond with the $18,100 cashier's check and the $1,900 cash received from the defense fund. The $1,900 cash was retained by petitioner of which $950 was paid to the law firm of Johnson and Johnson as a retainer towards fees and expenses of Mr. Johnson who was joined as co-counsel on behalf of Dr. Ferguson. Petitioner claimed the $1,900 received from the defense fund was not returnable and could be used for any purpose on behalf of Dr. Ferguson. The facts concerning the $1,900 from the defense fund was first disclosed by petitioner during his explanation of the entire transaction when the first inquiry concerning the funds developed in 1969 and at which time no further action was taken. It is significant to note that petitioner was not charged or found to have converted the $1,900 from the Ferguson account and subsequently replaced it with $1,900 from the defense fund. The record is clear that all

transactions occurred the same day and petitioner had the entire $21,900 in his possession and instead of posting $20,000 out of the Ferguson account and retaining $1,900 from the defense account as fees and costs, he merely substituted a cashier's check for cash and posted the bond of $20,000. Approximately one year later this $20,000 was returned to Dr. Ferguson at the request of John Ferguson.

A review of the complaint and the decision of the Court clearly reflects that the Court relied upon the allegation that the petitioner had secured $1,900 from the defense fund by deceit, fraud, and misrepresentation in that he purportedly induced Mr. North to deliver the $1,900 check to him solely for the purpose of posting bond for Dr. Ferguson. Mr. North did not testify and Mrs. Iversen related her understanding of what Mr. North told her and stated:

> "Mr. North called and asked if I would go to Draper and get enough money to finish the bond."

Much of the Court's opinion is devoted to establishing that the petitioner purposefully and deliberately misled persons connected with the defense fund into believing he needed $1,900 for bond and it was received for bond and no other purpose. That therefore the Court concluded that he received $21,900 for bond money and retained $1,900 contrary to the express purpose for which he received the money. The petitioner, however, requested an opportunity to remand the case to the referee so that he could present evidence that the $1,900 was received for legal expenses and costs and sought an opportunity to show that

Mrs. Iversen's hearsay statements did not reflect the true facts and that he was guilty of no wrongdoing regarding this matter which was not an issue in the hearing. The dissenting opinion of Justice Winans characterized the transaction as:

> "What I believe we have in this proceeding against Mr. Goodrich, is a highly technical possible violation and a super-sensitive vindication of Canon 11 of Professional Ethics of the State Bar of South Dakota in force and effect in 1968 as set forth in the Court's opinion. I do not believe that the following language of such opinion is either justified or warranted by the record; '. . . and which $1,900 was procured through accused deceit, fraud and misrepresenation.'"

Petitioner was not charged with any wrongdoing regarding the $1,900 from the defense fund and was not put on notice before the hearing of any such allegations, he therefore could not be expected to defend such an allegation especially when the direct impact of said allegation was brought home for the first time in the opinion of the Court disbarring the petitioner from practice. Even after said opinion was written, the petitioner was denied a petition for rehearing and an opportunity to contest the findings of the Court.

In *Selling v. Radford*, 243 U.S. 46, 37 S. Ct. 377, 61 L. Ed. 585, the Supreme Court stated that:

"we should recognize the condition created by the judgment of the State Court unless, from an intrinsic consideration of the State record, one or all of the following conditions should appear:

(1) That the State procedure, from want of notice or opportunity to be heard, was wanting in due process.

(2) That there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on that subject; or

(3) That some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do."

Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall 333, 380, 18 L. Ed. 366; *Spevack v. Klein*, 385 U.S. 511, 515, 87 S. Ct. 625, 628, 17 L. Ed. 2d 575. He is entitled to procedural due process, which includes fair notice of the charge. See *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 507, 92 L.Ed. 682. In *Randall v. Brigham*, 7 Wall 523, 540, 19 L. Ed. 285, it was said that when proceedings for disbarment are

> "not taken for matters occurring in open Court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense."

In re Ruffalo, 390 U.S. 554, 88 S. Ct. 1222 (1968), the Court stated:

> "These (disbarment proceedings) are adversary proceedings of a quasi-criminal nature. The charges must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh."

In the instant case, the petitioner had furnished all the information and explanations in the prior inquiry which thereafter was dismissed. Unlike the *Ruffalo* case, the charges in the instant case regarding the $1,900 received from the defense fund were never formally made nor was the complaint amended to include said charges. Further, in the *Ruffalo* case, the accused was given an opportunity to explain the charges after they were included by amendment to the original charges which procedure still did not pass muster. In the instant case, no amendment was requested or made and after petitioner realized the $1,900 received from the defense fund would be a crucial element in the decision to disbar, petitioner requested an opportunity to present a defense which request was denied.

Petitioner contends the record establishes a complete absence of fair notice of the precise charges on which the disbarment order was based and further establishes a denial of the opportunity for explanation and defense on said charges, and further contends that the unreasonable delay from the first complaint wherein the petitioner was exonerated after a complete investigation by the Grievance Committee and the State Attorney General's office and this charge being resurrected some 27 months later and the demise of material witnesses and the moving of another material witness out of the country, that all of the above constitutes a denial of his constitutional rights of procedural due process and a fair, timely hearing.

It is therefore, further respectfully submitted, that the writ herein sought should be issued and the judgment of disbarment of the Supreme Court of South Dakota be reversed.

Respectfully submitted,

s/ Thomas J. Morris
Attorney for Petitioner
2060 North 14th Street
Arlington, Virginia 22201

CERTIFICATE OF SERVICE

In accordance with the Supreme Court rules, the undersigned attorney for the petitioner, hereby certifies that on the 2nd day of October, 1974, three (3) copies were mailed air mail postage prepaid to The Honorable Kermit A. Sande, Attorney General of South Dakota, Post Office Box 537, Pierre, South Dakota 57501.

s/ Thomas J. Morris
THOMAS J. MORRIS

APPENDIX A
COURT OPINION

#11085

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * *

IN THE MATTER OF THE DISCIPLINE

OF JOHN E. GOODRICH

AS AN ATTORNEY AT LAW

* * *

ORIGINAL PROCEEDING

* * *

Appendix A
Court Opinion

CHARLES POCHES, JR.
Fort Pierre, South Dakota

BLAINE SIMONS
Sioux Falls, South Dakota

CLAUDE A. HAMILTON
Sioux Falls, South Dakota

ROBERT B. LOOBY
Martin, South Dakota

Attorneys for John E. Goodrich

R. JAMES ZIESER
Special Assistant Attorney General
Tyndall, South Dakota

Attorney for State of
South Dakota

* * *

Appendix A
Court Opinion

OPINION FILED April 2, 1974

ANDERST, Circuit Judge.

A formal complaint was filed in this court on the 3rd day of February, 1972, charging John E. Goodrich with two different charges of dishonest and unprofessional conduct as an attorney at law. The accused filed an answer, and this court thereupon appointed the Honorable R.F. Manson, one of the judges of the Third Judicial Circuit, as referee to try the issues raised by the pleadings. Trial of the matter was held on June 10, 1972. The referee filed his Findings of Fact and Recommendations with this court on the 3rd day of July, 1973, discharging the Bosanco charge, sustaining the Ferguson charge and recommending that the accused be permanently disbarred from the practice of law. The accused filed exceptions thereto that were orally argued by his counsel. The special assistant attorney general appeared and announced that by reason of an action pending in the United States District Court (see note 3, infra) he would not argue or participate further herein.

The pertinent facts surrounding the charge sustained by the referee are as follows: During the early part of 1968 Dr. James S. Ferguson of Murdo, South Dakota, was charged by the attorney general's office with approximately thirty-five counts of felonies and approximately fifteen counts of misdemeanors concerning his practice of medicine. Doctor Ferguson retained the accused, John E. Goodrich, to represent him in his defense.

Appendix A
Court Opinion

Bond was originally set at $25,000. Later the amount of the bond was reduced to $20,000. The doctor could not personally raise the bond, nor could he procure a commercial bond. Contact was made with the doctor's brother, John Ferguson, an Australian rancher, requesting that he send the necessary bond money for his brother. Thereupon, John Ferguson transmitted the sum of $25,000 to the Lyman County Bank, Kennebec, South Dakota, with a letter of transmittal specifying that such sum was to be used only for bail bond purposes. The money was deposited on April 11, 1968, in a special checking account designated as "J. Ferguson Special Bond Account", and the accused signed a signature card giving himself sole access to the account.

At this same time, some of the friends of the doctor in the Murdo, South Dakota vicinity had contributed and solicited others for contributions that totaled in excess of $2,700 to be used in the doctor's defense. This money was deposited in a special checking account in the Draper State Bank subject to disbursement by Mrs. Delores Iversen and Mr. H. R. North.

On April 11, 1968, the accused drew and signed two checks on the J. Ferguson Special Bond Account in the Lyman County Bank, one in the sum of $18,101, payable to the Lyman County Bank, and the other in the sum of $1,900, payable to cash. In return he received a cashier's check in the sum of $18,100 payable to the clerk of courts of Jones County, South Dakota, and $1,900 cash.[1]

---

1. The bank charged a $1 fee for issuing the cashier's check.

Appendix A
Court Opinion

The accused then contacted Mr. North who, in turn, contacted Mrs. Iversen, who related it thus in her testimony:

> "Q. Do you remember the day the bond was posted for Doctor James Ferguson so you could get him out of jail? A. Yes, I do.
>
> Q. And do you remember who came to you or how you were contacted about this? A. I believe Mr. Goodrich called Mr. North and Mr. North called me and asked me if I would be ready to go to Draper and get enough money and *finish the bond." (Emphasis supplied.)*
>
> * * *
>
> "Q. Do you remember any of the conversation preliminary to your drawing out the money from this account? A. All real excited and just the feeling we were at least going to finally get him out and then they said we needed the $1,800.
>
> Q. Was it 19 or 18? A. Nineteen.
>
> Q. Nineteen hundred dollars? A. Yes.
>
> Q. Do you remember who said that? A. John (Goodrich)."

Appendix A
Court Opinion

Mrs. Iversen then drew and signed a check payable to the Draper State Bank in the sum of $1,901. In return she received a cashier's check in the sum of $1,900 payable to the Jones County clerk of courts.[2] She gave this check to the accused who deposited it and the $18,100 cashier's check with the Jones County clerk of courts. Doctor Ferguson was then released from jail.

Prior to this time Doctor Ferguson wanted the accused to obtain co-counsel, and because of the severity of the charges and the number thereof the accused agreed that George Johnson of Johnson & Johnson, Gregory, South Dakota, should assist on the case. After the release of Doctor Ferguson, the accused gave $950 cash to the firm of Johnson & Johnson as a retainer and payment on attorneys' fees. He retained the other $950 as payment towards his fees and expenses.

Evidence was that the remaining funds in the special "Iversen-North Account" in the Draper bank were used for Doctor Ferguson's personal and legal expenses. Control over the remainder of the money, as well as the bond money from the "J. Ferguson Special Bond Account" that was refunded by the Jones County clerk of courts, was turned over to Doctor Ferguson by the accused with the consent of John Ferguson, and this money was used by Doctor Ferguson for his personal needs. The accused contends that his actions in light of the foregoing were only bookkeeping entries and that he did nothing dishonest or unprofessional.

---

2. Here again, the bank charged a $1 fee for issuing the cashier's check.

Appendix A
Court Opinion

The Canons of Professional Ethics of the State Bar of South Dakota in force and effect in 1968 read in pertinent part as follows:

> "11. Dealing With Trust Property.
>
> The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.
>
> Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or used by him."

By the above described acts, the accused procured $21,900, which was $1,900 in excess of the required bond and which $1,900 was procured through accused's deceit, fraud and misrepresentation. The money in the "J. Ferguson Special Account" was specifically limited for bond purposes only, and the money given to the accused by Mrs. Iversen was to "finish the bond." All moneys received by the accused were thus given to him in trust for a specific purpose — to deposit as bond for Doctor Ferguson. The accused in violation of this trust procured and appropriated $1,900 of bond money for his own purposes. The fact that some or all of this money may have been or was

later used for other purposes is immaterial and is no defense to this proceeding. This court and other courts have held that the intent to repay the money taken or to put the money to a use which may later be authorized has no bearing on the actions taken at the time the money was misappropriated or collected. *In Re Kaas*, 39 S.D. 4, 162 N.W. 370. Failure of the Grievance Committee or the attorney general to file a complaint as to the Ferguson charge in August 1970 does not affect the merits of that charge.

The referee further found, and the record supports such finding, that the accused during the hearings was less than forthright, that he frequently evaded direct answers to questions, and that he similarly gave complex and unresponsive answers to plain questions susceptible of simple answers. Such actions on the part of the accused are pertinent to the issue under consideration.

The accused is not a young or inexperienced attorney, having first been admitted to practice law on August 29, 1946. He continually practiced law in this state until his disbarment on September 24, 1959 (*In Re John E. Goodrich*, 78 S.D. 8, 98 N.W.2d 125). On November 17, 1965, he was reinstated to the practice of law by this court and has practiced to date. The prior record of an attorney may be considered in determining the appropriate discipline. *Simmons v. State Bar of California*, 87 Cal. Rptr. 368, 2 Cal.3d 719, 470 P.2d 352.

Appendix A
Court Opinion

These proceedings are not to administer punishment for criminal misdeeds but to exercise the court's power to make it impossible for men whose honesty and reliability as members of the legal profession have been certified to by this court and who have wronged their client's trust to commit further wrongs toward those who may seek their services. *In Re Kaas, supra.* The practice of law is a qualified right granted upon demonstration of legal fitness and satisfactory moral character. To continue in the enjoyment of this right one must maintain this fitness and character. *State ex rel. Rice v. Cozad,* 70 S.D. 193, 16 N.W.2d 484. The purpose of disbarment is to guard the administration of justice and to protect the courts, the profession and the public from those practitioners who have failed to maintain the required fitness. *In Re Hosford,* 62 S.D. 374, 252 N.W. 843. If that protection requires that a lawyer be disbarred or suspended it almost always results in hardship to him and his family. This naturally makes these cases unpleasant.

Although the accused did not raise any constitutional questions in the hearing before the referee or in his objections to the referee's report, he did raise certain constitutional questions in his brief filed in this court. We have considered those questions, together with his challenge to the constitutionality of our disbarment procedures, on their face and as applied to him in this proceeding, as set forth in his complaint in his action in United States District Court (see footnote 3, infra), and we have concluded that the constitutional claims raised by accused are without merit.

Appendix A
Court Opinion

The unfitness of John E. Goodrich to continue in the practice of law having been established by the clear preponderance of the evidence, we are of the opinion that a judgment of permanent disbarment against the accused as recommended by the referee should be entered.[3]

It is so ordered and adjudged.

BEIGELMEIER, Chief Justice, and WOLLMAN, Justice, concur.

WINANS and DUNN, Justices, dissent.

ANDERST, Circuit Judge, sitting for DOYLE, Justice, disqualified.

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3 During a two-week period of arguments scheduled by the court, oral arguments in this proceeding as to the Findings of Fact and Recommendations of the referee were set for, and heard on, September 27, 1973. On that morning a Summons, Complaint and a Motion for Temporary Restraining Order in an action titled In The United States District Court, District of South Dakota, Central Division, naming John E. Goodrich as plaintiff and the Supreme Court of the State of South Dakota, The State Bar of South Dakota, and Kermit A. Sande, Attorney General of South Dakota, as defendants, together with a Notice thereon that the Motion would be heard on September 26, 1973, at 10 a.m. at Aberdeen, South Dakota, were served on the Chief Justice of this Court. Obviously, the court could not, and did not, appear at that hearing. We are advised no such temporary restraining order was entered against the court, though some direction or order may have been entered against the other named parties. This situation may account for some of the delay in the writing and filing of the court's opinion in this proceeding. At a later date, an Answer, including Motions to Dismiss, was filed by the court, and thereafter counsel did appear for the court, and on the Motions made the plaintiff's action was dismissed on February 13, 1974, by the United States District Court.

Appendix A
Court Opinion

DUNN, Justice (dissenting).

I am in agreement with the majority that our disbarment procedures are constitutional.

I am also in agreement with the majority that the prior record of disbarment may be considered in determining the appropriate discipline for Mr. Goodrich, but I am not in agreement that it should be considered in determining his guilt. The Ferguson case was investigated by the Grievance Committee some three years ago on the complaint of John Ferguson. Following a full disclosure of the handling of the accounts, John Ferguson withdrew his complaint. Dr. James Ferguson moved back to Australia and John Ferguson died. The file of the Grievance Committee was closed.

Upon a second complaint being filed in 1972 in the Bosanco case, which the referee heard and found to be "not proven", the Ferguson case was resurrected and now is the basis of John Goodrich's disbarment. If the Ferguson case was to be the basis of disbarment, it should have been prosecuted in 1971 when the Fergusons were available to testify. The renewal of these charges after almost three years have elapsed denies to Mr. Goodrich very fundamental rights. I must respectfully dissent.

WINANS, Justice (dissenting).

I concur in the dissent of Justice Dunn. Also I am in agreement with the majority that our disbarment procedures are constitutional. I would add but a short statement as background. The referee made rather short shrift of the Bosanco

charge and I think he was correct in so doing. Whatever complaint was originally made by Dr. Ferguson or his brother John or both against John Goodrich appears to have been completely adjusted and settled among themselves. This is borne out by an Exhibit signed by Dr. Ferguson under date of June 16, 1971. It also appears that nearly one year earlier the office of the Attorney General of the State of South Dakota, by a letter addressed to the Chairman of the South Dakota Grievance Committee, dated August 26, 1970, was likewise satisfied with the explanation and showing made by Goodrich, through his attorney, of his conduct then under investigation. The last paragraph of the Attorney General's letter concludes with this statement:

> "Unless this office is notified by either the Grievance Committee or the South Dakota Supreme Court that further action or investigation is required by the Attorney General, we will close our file in this case."

What I believe we have in this proceeding against Mr. Goodrich is a highly technical possible violation and a super-sensitive vindication of Canon 11 of Professional Ethics of the State Bar of South Dakota in force and effect in 1968 as set forth in the Court's opinion. I do not believe that the following language of such opinion is either justified or warranted by the record: " . . . and which $1,900 was procured through accused's deceit, fraud and misrepresentation." These are serious charges, the same on which the Attorney General had previously closed his files. I think the majority opinion goes too far and at too late a date. For these reasons, I dissent from the judgment of outright disbarment in this case.

APPENDIX B
ORDER DENYING REHEARING

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE DICIPLINE
OF JOHN E. GOODRICH AS AN ATTORNEY
AT LAW

ORDER DENYING REHEARING

A petition for rehearing in the above cause having been filed April 19, 1974, and no issue or question of law or fact appears to have been overlooked or misapprehended, and more than fifteen days have elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices thereof requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court the petition for rehearing is denied.

DATED at Pierre, South Dakota, this 7th day of May, 1974.

BY THE COURT:

s/ Frank Biegelmeier
Chief Justice

ATTEST:

(Illegible)
Clerk of the Supreme Court

APPENDIX C
ORDER DIRECTING A FORMAL COMPLAINT

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

IN THE MATTER OF THE DISCIPLINE
OF JOHN E. GOODRICH.

It appearing to the satisfaction of the court from information and investigations made that the above named John E. Goodrich may have engaged in unprofessional conduct as an attorney at law and that a formal complaint should be prepared and filed against said attorney charging him with unprofessional conduct.

IT IS, THEREFORE, ORDERED that the Attorney General of the State of South Dakota is hereby directed to prepare and file a formal complaint against the above named John E. Goodrich with reference to the alleged unprofessional conduct of said attorney, and any other alleged unprofessional conduct of said attorney of which the attorney general may be advised within twenty days from the date of this order.

IT IS FURTHER ORDERED that upon the preparation of said complaint the same be personally served upon John E. Goodrich and that he have twenty days after the service thereof in which to file an answer thereto.

Appendix C
Order Directing a Formal Complaint

DATED at Pierre, South Dakota this 19th day of January, 1972.

BY THE COURT

s/ Charles S. Hanson
Presiding Judge

ATTEST:

(Illegible)
Clerk of the Supreme Court

APPENDIX D
COMPLAINT

IN THE MATTER OF
THE DICIPLINE OF
JOHN E. GOODRICH

COMES NOW the Attorney General of the State of South Dakota, pursuant to Order of this Court filed on the 19th day of January, 1972, makes and files this formal complaint against John E. Goodrich, and complains and charges:

I

ADMITTED TO PRACTICE

John E. Goodrich is duly licensed to practice as an attorney and counsellor at law in the courts of South Dakota, having taken the oath of an attorney on or about the 29th day of August, 1946, having been previously disbarred on or about the 29th day of September, 1959, and having been reinstated and retaken the oath of an attorney on or about the 19th day of November, 1965. John E. Goodrich is now and at all times herein mentioned has been, licensed and enrolled as an attorney and counsellor at law in this state, and a member in good standing of the integrated State Bar of the State of South Dakota. At the present time, John E. Goodrich resides in Pierre, South Dakota and maintains a law office in Pierre, South Dakota.

Appendix D
Complaint

II

FERGUSON BOND

PRELIMINARY FACTS

Dr. James Smith Ferguson, was arrested and confined in jail on certain criminal charges in or about the first part of 1968. In connection with these charges, Dr. Ferguson employed John E. Goodrich. Bail for the charges was set at $25,000. A draft in the amount of $25,000 was entrusted to John E. Goodrich by John Ferguson, Dr. James Smith Ferguson's brother, who resided in Brisbane, Australia. The sole purpose of the draft was to furnish a cash bail bond. The draft was deposited in the Lyman County Bank, now known as the United National Bank, in an account designated "J. Ferguson Special Bond Account." John E. Goodrich was the only one authorized to write checks on this account.

III

VIOLATION OF PURPOSE OF TRUST

On or about April of 1968, Dr. James Smith Ferguson's bond was reduced to $20,000. On or about April 11, 1968, two (2) checks were written on the "J. Ferguson Special Bond Account," one in the amount of $18,101, made out to the Lyman County Bank; and one in the amount of $1,900, made out to cash. The $20,000 bail was paid for by a Lyman County Bank cashier's check in the amount of $18,100 and a bank draft from

the Draper State Bank in the amount of $1,900. Additional checks were written on the special account up until on or about July 17, 1968, leaving a balance in the account as of that date of $1,949, when John E. Goodrich completely relinquished control over the account and allowed checks to be written on it by Dr. James Smith Ferguson without the approval, control, or supervision of John E. Goodrich.

IV

FAILURE TO RETURN MONEY

On or about July 30, 1969, the appearance bond of $20,000 was released and a check in that amount was made out to "John E. Goodrich, Attorney" by the clerk of courts. The check was written on the Jones County State Bank of Murdo, South Dakota. John E. Goodrich cashed the check at the Draper State Bank in Draper, South Dakota, and exchanged it for two separate checks, one made out to the "John S. Ferguson Special Bond Account" in the amount of $18,100 and the other made out to "Delores Iversen and H.B. North" in the amount of $1,900. The check in the amount of $18,000 was deposited in the "J. Ferguson Special Account" at the Lyman County Bank. This money, together with the balance in the account, less transfer charges, or a total of $18,223.16 was returned to John Ferguson in Australia, the amount returned being $1,776.84 less than the amount of the bail bond money which was returned to John E. Goodrich.

Appendix D
Complaint

V

ROBERT BOSANCO CASE

PRELIMINARY FACTS

In or about July of 1971, Mr. Robert Bosanco hired John E. Goodrich to defend him in a case in which he was charged with driving while intoxicated which arose from an automobile accident which occurred on or about July 23, 1971. On the night of November 22, 1971, the evening preceding the trial, Mr. Bosanco conferred with John E. Goodrich and told Mr. Goodrich that he had seen a doctor for the first time that same day about an alleged heart condition and had received his first prescription for nitroglycerine pills on that same date, November 22, 1971.

VI

UNETHICAL BEHAVIOR

In the trial of *State v. Bosanco*, which took place in Philip, South Dakota, on November 23, 1971, John E. Goodrich attempted to show the jury that Robert Bosanco was taking nitroglycerine pills prescribed by his doctor on the date the accident took place, i.e., July 23, 1971, when John E. Goodrich knew as a fact that Mr. Bosanco had not seen a doctor or obtained a prescription for nitroglycerine pills until the day

before the trial, i.e., November 22, 1971. Upon questioning by the Judge sitting on the case, the Honorable Robert A. Miller, Mr. Goodrich denied knowing that the nitroglycerine pills, which he alleged were being taken by Mr. Bosanco, were not available to him at the date of the accident.

WHEREFORE, the Attorney General prays as follows:

That such proceedings be had as may be provided by law, and that the license of the said John E. Goodrich to practice as an attorney and counsellor at law in the State of South Dakota be revoked and cancelled and that his name be striken from the roll of attorneys of this state and such other relief as may be proper in the circumstances.

DATED at Pierre, South Dakota this 3rd day of February, 1972.

GORDON MYDLAND,

Attorney General
State of South Dakota

By s/ Thomas B. Vickerman
Assistant Attorney General
Suite A-304
Capitol Annex
Pierre, South Dakota 57501

APPENDIX E

ANSWER TO THE COMPLAINT

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 11085

IN THE MATTER OF
THE DICIPLINE OF
JOHN E. GOODRICH

ANSWER

Comes now the undersigned, one of the attorneys for John E. Goodrich, and to the formal complaint filed against said John E. Goodrich states and alleges as follows:

I.

Denies each and every allegation contained in said formal complaint except those matters which are hereinafter specially admitted.

II.

Admits paragraph one entitled "Admitted to Practice."

Appendix E
Answer to the Complaint

III.

Admits all of paragraph three entitled "Ferguson Bond Preliminary Facts," except the last sentence wherein it is stated that "John E. Goodrich was the only one authorized to write checks on this account."

IV.

In answer to paragraph three of formal complaint that certain book transactions occured with reference to this matter, and after July 17, 1968, John E. Goodrich's name was stricken from the Ferguson Special Account and Doctor James Ferguson's name was inserted. This request had been conveyed by the bank, and a full and complete accounting was forwarded to John Ferguson. That from said date John Goodrich was no longer bound to care for said funds nor allowed to draw upon this, and the sole responsibility thereafter rests upon Doctor James Ferguson.

V.

In answer to paragraph four entitled "Failure to Return Money," admits that sum $20,000 was released by the Clerk of Courts, that because Doctor James Ferguson had since July, 1968, exercised control of all money of the special account, the funds were turned over to him, that the responsibility for said funds was upon Doctor James Ferguson, that the said John E.

Appendix E
Answer to the Complaint

Goodrich did not receive any funds from the $20,000 returned, nor did John E. Goodrich receive $1776.84 from Doctor James Ferguson. That all funds returned to Australia were under the sole control, custody and care of Doctor James Ferguson.

VI.

That with reference to the *State v. Robert Bosanco* matter, John E. Goodrich's statements are on record, and any misstatements made were caused by the terrific pressure and no harm or improper procedure was intended. John E. Goodrich reserves the right to supplement this Answer with written exhibits and oral testimony.

WHEREFORE, the attorneys for John E. Goodrich ask that the Complaint be dismissed.

Dated in Sioux Falls, South Dakota, this 22nd day of February, 1972.

BLAINE SIMMONS and
CLAUDE HAMILTON

By CLAUDE HAMILTON

611 Northwestern Bank Building
Sioux Falls, South Dakota 57102

APPENDIX F
MOTION TO REMIT BACK TO REFEREE

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * *

IN THE MATTER OF THE
DICIPLINE OF John E. Goodrich
AS AN ATTORNEY AT LAW — MOTION

* * *

Comes now the undersigned one of the legal counsel for John E. Goodrich, and moves this Court for its Order remitting the above entitled matter back to the Referee in order that the undersigned, on behalf of said attorney, may present further evidence.

That this Motion is based upon the fact that the Referee had made a recommendation that said attorney be permanently disbarred and in his Findings weighs his decision heavily on matters which were not brought up at the time of the trial and which remain unclear in the record and the exhibits. That these matters concern the said attorney holding the cash of $1,900 until a date after the bond was posted and then distributing said funds, the work that he had performed on behalf of Doctor

Appendix F
Motion to Remit Back To Referee

Ferguson which matters involved numerous files, all of which explains his inability to remember all dates of correspondence, etc., the knowledge of Mrs. Iversen of the reduction of the bond prior to her drawing $1,900 for the payment of the bond, the purpose for which the Iversen-North fund was collected and used and other important matters which the Referee has implicated occurred, when such evidence is not in the record and further evidence will clear these matters up.

That the witnesses the undersigned intends to call and the points which he intends to establish are those as set forth in the attached Affidavits, to-wit, Affidavit John E. Goodrich, Exhibit 1, Affidavit Delores Iversen, Exhibit 2, Affidavit Earl Wedean, Exhibit 3, and Affidavit of Charles Rick Johnson, Exhibit 4. That this Motion is based upon all records and files herein, together with the attached Affidavits. Further, to deny Attorney Goodrich the right to answer these implications, and Findings which are not sustained by the evidence, nor the factual truth, would be to deny him his rights under the Federal as well as the State Constitution of the due process of law.

Respectfully submitted,

Attorneys for
John E. Goodrich

Blaine Simons
Robert Looby
Claude Hamilton
Charles Poches, Jr.

s/ Charles Poches, Jr.

Appendix F
Motion to Remit Back to Referee

CERTIFICATE OF SERVICE

The undersigned as one of the attorneys for John E. Goodrich, does hereby certify that on the 17th day of July, 1973, he served a true and correct copy of the above Motion and attached Affidavits on the Attorney General, State of South Dakota, by leaving a true and correct copy with said Attorney General.

Dated this 17th day of July, 1973.

s/ Charles Poches, Jr.

STATE OF SOUTH DAKOTA

AFFIDAVIT

COUNTY OF JONES

EARL WEDEAN, being first duly sworn on his oath, deposes and states:

That he is a resident of Jones County South Dakota, and has been for more than one year last past, and was a resident of Jones County South Dakota during the years 1967 and 1968; that he is the owner and operator of a cattle and livestock ranching business in Jones County, that he was well acquainted with James S. Ferguson, M.D., that he knew of his own knowledge that Dr. Ferguson was arrested on February 13, 1968

Appendix F
Motion to Remit Back to Referee

for a large number of offenses, and placed in Jones County jail under bond in the amount of $25,000; that Dr. Ferguson was unable to raise $25,000 for a bond, and while incarcerated in the Jones County jail was unable to provide the necessarys of life for his family, and also unable to earn any money to pay an attorney to provide for his own defense; that this affiant contacted this affiants attorney of many years, John E. Goodrich, who this affiant also knew represented Dr. Ferguson in his problems, with the purpose in mind of discussing the possibility of obtaining a professional bail bond for Dr. Ferguson to obtain Dr. Ferguson's release from jail.

That this affiant is familiar with the necessary costs incurred in obtaining bonds and the fees charged, because in this affiant's ranching operation affiant leased land from the Bureau of Indian Affairs, and a bond was required on each and every lease; that affiant had used the services of John E. Goodrich on many occassions in obtaining these bonds and knew that the bond of Dr. Ferguson would be extremely costly to obtain and difficult to accomplish, and the services of a professional person would be required, in order to hold down the costs therein. Affiant discussed this matter with John E. Goodrich including all the avenues that were open to them in obtaining a bond for Dr. Fergusons release, including this affiants suggestion that maybe the funds could be raised by open solicitation from the supporters of Dr. Ferguson for the cost of the bond, for Dr. Ferguson's living expenses and those of his family, for legal fees, and other costs which might arise, this fund to be used as a general SLUSH fund, to pay all expenses and place all money coming in.

Appendix F
Motion to Remit Back To Referee

That John E. Goodrich advised this affiant that if said public solicitation procedure would be followed, anybody that gave money must understand that it would be a definite contribution for Dr. Ferguson and that any money so obtained would not and could not be returned to the donor.

That this affiant discussed with John E. Goodrich what the costs and fees and living expenses might run in this matter, and Goodrich advised that he was not in position to give a positive statement, but that the fees in obtaining the bond only would be quite expensive because of the publicity given and the fact that the state would resist them at every turn of the road, and as to attorneys fees and the Ferguson family's living costs, it would all depend on the time involved and the additional counsel that Dr. Ferguson might request.

That at a subsequent meeting of the persons interested, including Howard North and Delores Iversen and this affiant, in obtaining the release of Dr. Ferguson, chaired by this affiant, it was decided by those present that a SLUSH fund should be established in the Draper State bank, and that the signatures authorized to sign checks would be that of Delores Iversen and Howard North. John E. Goodrich was present at this meeting and again stated to these persons present that any money so received would be used for the obtaining of a bail bond for Dr. Ferguson, and for legal fees and for living expenses of the Ferguson family, and that no funds obtained would be returned, that this was strictly a donation.

Appendix F
Motion to Remit Back to Referee

That your affiant was a substantial contributor to the Ferguson SLUSH fund, and also gave meat and other provisions to the Ferguson family, and brought in wood and fuel for the Ferguson home as well as machinery helpful in the construction of the Ferguson home. This affiant never received any money in return from the SLUSH fund and has no knowledge of anyone else ever receiving any money back either.

Your affiant also knew of his own knowledge of the hearing held in Murdo in the Jones County Circuit Court on March 29, 1968 relative to the reduction of the $25,000 bond and knew through the news media that day of the reduction of the amount of the bond from the $25,000 amount to that of $20,000.

Further, your affiant sayeth not.

s/ Earl Wedean
Earl Wedean

Subscribed and sworn to before me this 14th day of July, 1973

s/ Louise K. Keever
Notary Public
My Comm Exp. 2/10/77

Appendix F
Motion to Remit Back to Referee

STATE OF SOUTH DAKOTA

AFFIDAVIT

COUNTY OF HUGHES

John E. Goodrich, being first duly sworn on his oath, deposes and states that he was originally retained by Doctor James S. Ferguson of Murdo, on or about February 13, 1968. That this affiant represented Dr. Ferguson concerning all the jury cases tried in Jones County. Shortly thereafter, G. F. Johnson and Rick Johnson were also obtained as co-counsel. Johnson and Johnson assisted in trying the first charges against Dr. Ferguson.

This affiant also was retained by Dr. Ferguson concerning several civil matters and various other legal matters involving some of the Ferguson children.

This affiant states that a certain application to reduce the bond from $25,000 to $20,000 was prepared by the Johnson law firm. Johnson and Johnson, along with this affiant, were present at Murdo on the 29th day of March, 1968, at 10:00 o'clock A.M., where arguments were heard concerning reducing the bond to $20,000. Other matters were also discussed as a result of other motions at the same time.

Delores Iversen of Murdo, South Dakota, was present in the Court room at the hearing when the bond was reduced.

Appendix F
Motion to Remit Back To Referee

The Ferguson case had state wide news coverage by United Press and Associated Press. The TV, newspapers, and radio that covered the Murdo area, covered the news item that the bond was reduced to $20,000.

To further substantiate this coverage, a search was made of the press releases published in the "Capital Journal," and on the front page in bold type in the April 1, 1968, edition read: "FERGUSON MOTIONS DENIED," and appearing in the said article was the following:

> "Judge Fosheim reduced his bond from $25,000 to $20,000."

Thus, not only Delores Iversen, but the people in Jones County generally had knowledge that the bond was reduced.

This affiant states that examining this affiant's records and files, that this affiant believes that fifty per-cent of this affiant's time was spent for a period of many months preparing for trial, obtaining Affidavits from witnesses concerning the forty-seven charges, working on civil matters for Dr. Ferguson, criminal matters concerning Dr. Ferguson's son, consulting with the Johnson law firm, and meetings in Pierre with the Attorney General's Office.

It was also necessary to defend Dr. Ferguson in Pierre concerning hearings involving the attempt to revoke Dr. Ferguson's license to practice medicine. Other hearings were held in Pierre. In fact, this affiant has two file drawers completely full of material involving all Dr. Ferguson's matters.

both criminal and civil. This affiant states that the trial involving the second group of charges, which took approximately two weeks time to try, of which a compromise verdict was reached, and because of this type of verdict, it was subsequently reversed by the Supreme Court. This appeal was handled by Dudley R. Herman of Gregory.

It must be remembered that there were about thirty felony charges and seventeen misdemeanors That one of the felony cases involved the death of one of Dr. Ferguson's patients. That this affiant did not know which of the various charges would be tried first, or how the cases would be bunched up and tried. This affiant did all the leg work for several months preparing a defense for all these various charges.

It was further necessary to obtain Affidavits to prepare motions to dismiss all charges on the grounds that the cell block where Dr. Ferguson was incarcerated was bugged. Several people had to go down to the County Jail and actually saw the microphone that was in the wall under a calendar.

This affiant believes that based on all the work done for Dr. Ferguson, that a reasonable fee of $10,000.00 could be charged. Of course, this affiant has not received that money.

This affiant further states that Dr. Ferguson contacted this affiant shortly before Dr. Ferguson wanted to return to Australia. That Dr. Ferguson advised this affiant that he had no money to get to California, where airline tickets were waiting for himself, his wife, and family. Dr. Ferguson advised this affiant that his wife wanted to take with her several pieces of her furniture and would need a truck. Further, that one of Dr.

Appendix F
Motion to Remit Back to Referee

Ferguson's sons would drive the truck. This affiant knew at that time that the Ferguson family could not all get into the truck. This affiant then made arrangements to obtain a rented car so Dr. Ferguson's family could ride out to California and follow the truck. Dr. Ferguson thought he had enough money to take care of the meals and thus, this affiant gave to Dr. Ferguson two of this affiant's credit cards, which the Ferguson family used, with this affiant's authority to take care of gas, oil, lodging, and any other expenses. The car and the truck were left in California. This expenditure alone, by this affiant, amounted to several hundreds of dollars.

Also, before Dr. Ferguson left, this affiant prepared a large number of Affidavits in matters which this affiant was handling for Dr. Ferguson. There is in these files, correspondence from Dr. Ferguson stating this affiant is still counsel for Dr. Ferguson.

That even as late as July 16, 1973, this affiant received a long distance call which involves additional Dr. Ferguson business and that this affiant again is writing today advising Dr. Ferguson concerning this matter.

Dated this 17th day of July, 1973.

s/ John E. Goodrich
John E. Goodrich

Subscribed and sworn to before me this 17th day of July, 1973.

s/ Robert Bloch
Notary Public
Commission expires 3/8/75

Appendix F
Motion to Remit Back to Referee

STATE OF SOUTH DAKOTA

AFFIDAVIT

COUNTY OF GREGORY

CHARLES R. JOHNSON, being first duly sworn on his oath, deposes and states:

That he is a resident of the State of South Dakota, and has been for more than one year last past; that he is a member of the firm of Johnson and Johnson, Attorneys at Law, officing in Gregory, South Dakota; that he is a practicing Attorney and a member of the State Bar of South Dakota; that he was engaged in the practice of law at Gregory, South Dakota, with his father, the late George F. Johnson, also known as G. F. Johnson, during the years of 1967 and 1968; that he is well acquainted with the signatures of his father; that during the year 1968, the services of the said law firm were engaged by one James S. Ferguson M.D., of Murdo, South Dakota, and that one John E. Goodrich, Attorney at Law, was also retained by James S. Ferguson as Ferguson's attorney.

That attached hereto and made a part hereof is a receipt which bears the signature of G. F. Johnson and affiant states that this appears to be and is the signature of his late father, G. F. Johnson; that although the receipt is not dated, the banking records of the Johnson law firm reflect this amount of money was deposited in the firm account on or about April 16, 1968.

Appendix F
Motion to Remit Back to Referee

Dated this 16th day of July, 1973.

s/ Charles R. Johnson
Charles R. Johnson

Subscribed and sworn to before me this 16th day of July, 1973.

(RECEIPT)

No. 202

19

RECEIVED FROM John E. Goodrich

Nine Hundred Fifty & no/100 DOLLARS

on Ferguson Matter

s/ G. T. Johnson

STATE OF SOUTH DAKOTA
SS AFFIDAVIT
COUNTY OF JONES

DELORIS IVERSEN being first duly sworn on her oath, deposes and states:

Appendix F
Motion to Remit Back to Referee

That she is a resident of Jones County South Dakota and had been for more than one year last past, and was a resident of Jones County South Dakota during the years 1967 and 1968; that she was one of the interested citizens in the welfare of James S. Ferguson M.D. and one of the persons who solicited funds to provide the money for the expenses incurred on behalf of Dr. Ferguson while he was incarcerated in the Jones County jail and also to try and obtain a bond to get him released from confinement; that she was aware that the bond had been fixed in the sum of $25,000.00 to release Dr. Ferguson from custody, and that she was also aware of and had personal knowledge of the fact that at a hearing held in Jones County Circuit Court at Murdo South Dakota, on March 29, 1968 that the bond had been reduced from $25,000.00 to $20,000.00 and your affiant was present in the courtroom at the time of the hearing, on said date.

Further your affiant sayeth not.

s/ Deloris Iversen
Deloris Iversen

Subscribed and sworn to before me this 15th day of July, 1973.

s/ Robert Bloch
Notary Public
My Comm. exp. 3/8/75

APPENDIX G
AFFIDAVIT RESISTING MOTION TO REMIT

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

IN THE MATTER OF THE
DISCIPLINE OF John E. Goodrich
AS AN ATTORNEY AT LAW

STATE OF SOUTH DAKOTA
SS.
COUNTY OF BON HOMME

R. James Zieser, special assistant to the Attorney General, being first duly sworn, deposes and states:

That this Affidavit is made for the specific purpose of resisting the motion of John E. Goodrich asking that the above entitled matter be remitted back to the referee for the purpose of presenting further evidence.

That the motion of John E. Goodrich was based upon four distinct allegations hereinafter considered individually.

FIRST, It is alleged that it is unclear in the record whether or not John E. Goodrich held the $1900.00 taken from the trust account, "until a date after the bond was posted and then distributing the funds." Your affiant states that it is entirely

Appendix G
Affidavit Resisting Motion to Remit

immaterial what length of time said moneys were held by John E. Goodrich but rather that at the instant of the taking or co-mingling to-wit, on the 11th day of April, 1968, the violation of the canon of professional ethics is adopted pursuant to Section 27 of the by-laws of the State Bar of South Dakota was complete.

SECOND, It is further alleged that the work performed on behalf of Dr. James Ferguson, hereinafter referred to as Dr. Ferguson, was voluminous and explains his "John E. Goodrich" inability to remember all dates of correspondence. Your affiant states that work performed for Dr. Ferguson does not in any way create a liability attributable to John Ferguson, brother of Dr. Ferguson and an Australian citizen, nor does said work authorize or permit John E. Goodrich to remove or co-mingle funds specifically provided for bond purposes and entrusted to John E. Goodrich with the direction that they be used in that manner only.

THIRD, It is further alleged and supported by affidavits that Mrs. Iversen was aware that the bond was reduced as she was present at the hearing before Judge Poshiam when the matter was accomplished. Again your affiant fails to see the materiality of this information. The question is whether or not John Ferguson knew prior to providing the bond and whether the said John Ferguson authorized any part of the trust account to be used by John E. Goodrich and finally whether or not John E. Goodrich co-mingled with his own funds the moneys specifically provided for bail bond purposes. The facts pertaining hereto are amply supported in the evidence that John

Appendix G
Affidavit Resisting Motion to Remit

E. Goodrich was fully aware on April 11, 1968, that the John Ferguson money, thus sent to the Lyman County Bank was transmitted with only one purpose and that being for purposes of bail bond, and that John E. Goodrich, upon asserting sole control over the account in which the money was deposited, knowingly became a trustee, responsible only to John Ferguson, to assure the sole use of said fund for bail purposes only and to account fully and honestly therefore.

FOURTH, It is alleged that the purpose for which the Iversen-North fund was collected and used merits additional evidence. Your affiant further fails to see the merit in this contention, primarily because the evidence of the transaction obviously shows a portion, to-wit, the $1900.00, was used to pay a part of the $20,000.00 bail bond; however, this money is not the crux of contention but rather the crux lies in the $1900.00 taken from the trust account by John E. Goodrich and co-mingled and used by him without authority therefore.

It is therefore the request of this affiant that the motion of John E. Goodrich be denied.

s/ R. James Zieser
Special Assistant Attorney General

Subscribed and sworn to before me this 20th day of July, 1973.

s/ J. Dunn
J. Dunn, Notary Public

(SEAL)

Appendix G
Affidavit Resisting Motion to Remit

CERTIFICATE OF SERVICE

The undersigned, in his capacity as special assistant Attorney General, does hereby certify that on the 20th day of July, 1973. he served a true and correct copy of the above Answering Affidavit in Resistance to Motion on Charles Poches Jr., Blaine Simons, Robert Looby and Claude Hamilton, Attorneys for John E. Goodrich, by mailing a true and correct copy of said Answering Affidavit in Resistance to Motion.

Dated this 20th day of July, 1973.

s/ R. James Zieser
R. James Zieser
Special Assistant Attorney General

APPENDIX H
ATTORNEY GENERAL'S MOTION BASED UPON ORAL ORDER — SEPTEMBER 27, 1973

IN THE SUPREME COURT

OF

THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE DISCIPLINE

OF JOHN E. GOODRICH, ATTORNEY AT LAW

The above entitled matter having come on before this Court with proper notice on the 27th day of September, 1973, John E. Goodrich appearing by counsel, Charles Poches Jr. and the attorney general appearing by special assistant attorney general R. James Zieser.

R. James Zieser does by these presents inform this Court that the Attorney General of South Dakota was, by oral Order, from the bench of Judge Axel Beck of the Federal District County of South Dakota, on the 26th day of September, 1973, forbidden to proceed in the above entitled matter, which temporary restraining order arose out of a separate action commenced by John E. Goodrich as plaintiff in said Federal District Court against the South Dakota Attorney Generals Office, the South Dakota Supreme Court and the South Dakota

Appendix H
Attorney General's Motion

Bar Association and that in conformity with said Order, the South Dakota Attorney Generals Office appeared but offered no argument with leave of the South Dakota Supreme Court.

Dated this 27th day of September, 1973.

KERMIT SANDE
South Dakota Attorney General

s/ R. James Zieser
Special Assistant Attorney General

APPENDIX I
JUDGMENT OF DISBARMENT

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

IN THE MATTER OF THE DISBARMENT

OF JOHN E. GOODRICH

A formal accusation having heretofore been filed charging the above named Attorney at Law with unprofessional conduct, and the accused having made his answer thereto, the Court appointed The Honorable R. F. Manson, one of the Judges of the Third Judicial Circuit of Watertown, South Dakota, to act as Referee to try the issues and to make a return and report to this Court of his Findings of Fact and Recommendations, and the Referee having heard the evidence and having made and submitted his Findings of Fact and Recommendations wherein he found that the accused converted money in his custody as trustee for bail bond purposes to his own use, and recommended that the accused be permanently disbarred from the practice of law in this state for knowing violation of his professional obligation as an attorney at law and trustee of such funds, and this Court after hearing and consideration of such Findings of Fact and Recommendations of the Referee in accordance therewith and with its written opinion herein

Appendix I
Judgment of Disbarment

ORDERS and ADJUDGES that the above named John E. Goodrich be and he is hereby disbarred from practicing as an Attorney and Counselor at Law in any of the courts of this state, and the license to practice law heretofore granted by this Court to the said attorney is hereby canceled and revoked and the Clerk of this Court is authorized and directed to strike the name of the said John E. Goodrich from the roll of licensed Attorneys and Counselors at Law on file in his office.

DATED At Pierre, South Dakota this 1st day of April, 1974.

BY THE COURT.

s/ Frank Biegelmeier
Chief Justice

ATTEST:

s/ (illegible)
Clerk of the Supreme Court

LIBRARY
SUPREME COURT, U. S.

FILED
DEC 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1974

No. 74-370

IN THE MATTER OF JOHN E. GOODRICH,

Petitioner,

vs.

STATE OF SOUTH DAKOTA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

KERMIT A. SANDE
Attorney General

MARVIN TRUHE,
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Attorney General's Office
State Capitol Building
Pierre, South Dakota 57501

Telephone: 605 224 3215

Attorneys for Respondent

November 27, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-370

JOHN E. GOODRICH

Petitioner,

vs.

STATE OF SOUTH DAKOTA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Dakota Supreme Court was filed on April 2, 1974, and is reproduced in Appendix A of the Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court should not be invoked under 28 USC §1257 and United States Supreme Court Rule 19 for the reason that the decision of the South Dakota Supreme Court is in complete accord with applicable decisions of this Court and for the further reason that the constitutional and statutory rights of the Petitioner have not been violated.

QUESTION PRESENTED

Were Petitioner's constitutional rights violated by his disbarment for appropriation to his own use of his client's trust funds in April, 1968, when said transaction was investigated by the Grievance Committee of the State Bar and the file closed on the matter by the State Attorney General's Office in August, 1970, and thereafter the State Supreme Court in January, 1972, directed the Attorney General to file a formal complaint against Petitioner for other alleged, and subsequently unproved, misconduct occurring in November, 1971, which said complaint also resurrected the April, 1968, transaction?

STATEMENT OF THE CASE

Respondent agrees generally with Petitioner's statement of the case, but not with the conclusions or interpreta-

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KERMIT A. SANDE
Attorney General

MARVIN TRUHE,
Assistant Attorney General
State of South Dakota
Attorney General's Office
State Capitol Building
Pierre, South Dakota 57501

Telephone: 605 224 3215

Attorneys for Respondent

tions drawn from those facts. These specific points of difference are covered in the Argument.

ARGUMENT

Respondent disagrees that Petitioner was disbarred for misappropriating $1,900 from the **Defense Fund** in the Draper State Bank. It was instead the $1,900 from the **Special Bond Account** in the Lyman County Bank that ultimately was appropriated to Petitioner's personal use.

The South Dakota Supreme Court stated in its opinion that Petitioner procured $21,900 for the expressed purpose of paying off the $20,000 bond. A sum of $18,100 taken from the bond account and a sum of $1,900 taken from the **Defense Fund Account,** both in the form of cashier's checks, were in fact used to pay off the bond. The Petitioner, however, also received an additional $1,900 in cash from the **bond account** on the same day for the expresed purpose of paying off the bond, but instead appropriated that money to his personal use. (See page 7A of Appendix "A" of petition.) The misappopriated money was taken from the bond account and not from the defense fund. Whatever the source of the misappropriated money, however, there is no question but that Petitioner procured $21,900 for the single expressed purpose of paying off the bond, and thereafter appropriated $1,900 of that sum to his own use.

Petitioner states in his brief that he was disbarred on allegations not charged in the original complaint and, thus, was not given fair notice of the charges. This statement is not well founded. The original complaint, (reproduced in Appendix "D" of Petition) paragraph III, is entitled **Violation of Purpose of Trust.** In that paragraph, specific reference is

made to the fact that sums totaling $21,900 were withdrawn for bond purposes when in fact the bond was set at $20,000. Clearly, that paragraph put Petitioner on notice that he was to be held accountable in court for those discrepancies.

Contrary to the allegation made on page 3 of the Petition, the Petitioner was given full opportunity at the Referee's Hearing and again before the South Dakota Supreme Court to confront witnesses and present his case with regard to the alleged misuse of trust funds.

Finally, Petitioner argues that the resurrection of charges previously "dismissed" seventeen months earlier violates his constitutional rights. Under South Dakota statutes, only the Supreme Court is empowered to order the issuance of a formal complaint. Therefore, the Attorney General wrote the letter to the South Dakota Supreme Court (cited on page 11 of Petition) advising that further action would be taken only if there were specific directions to do so. The charge was "dismissed" only in the sense that the Attorney General's Office investigated the charges but was never given an order by the South Dakota Supreme Court to prepare a formal complaint against Petitioner at that time.

Later, however, another totally unrelated allegation of misconduct was lodged against Petitioner for his actions in a November, 1971, lawsuit, and it was then that the South Dakota Supreme Court asked that a formal complaint be drawn against Petitioner which should include "any other alleged unprofessional conduct of said attorney."

Thus Petitioner's main argument is that the inclusion in the complaint of the matter which had not been acted

upon for seventeen months so violated his constitutional rights that his disbarment was improper. Yet at no time does Petitioner present a valid argument as to how the mere passage of time has jeopardized his ability to defend himself or violated his constitutional rights. The only argument he makes is that the subsequent death of John Ferguson (the source of the $25,000 bond account) and the fact that his client, Dr. James Ferguson, had subsequently moved to Australia had totally deprived him of any chance to present a meaningful defense in his behalf. What is patently clear is that Petitioner never states how the presence of either John Ferguson or Dr. Ferguson at the hearing could have affected the findings of the court. In fact, Petitioner had at no time shown any intent or interest in bringing Dr. Ferguson back from Australia to testify in his behalf. The reason is obvious. The testimony of neither man could alter the fact that Petitioner misappropriated the $1,900. It is of little consequence also that "John Ferguson withdrew his complaint" (page 8 of Petition), once the misappropiation had been made. Further, Petitioner's statement that he was not "confronted with his accusers" is inaccurate in that he was personally confronted with every witness against him regarding the withdrawal of the $21,900 from the two accounts. Neither Dr. Ferguson nor John Ferguson was a necessary witness against him nor was either one used as a witness against him in any sense of the word in proving that allegation. And as was earlier stated, Petitioner at no time, not even in his Petition, has offered any explanation as to how the presence of either man could have helped in his defense on that charge.

Thus, the complaint fairly apprised the Petitioner of what he must defend against; he was confronted with all witnesses and given a fair and full hearing to dispute those

charges; and he has not shown how the mere passage of seventeen months time has in any way affected any of his constitutional rights. No challenge has been made to the constitutionality of any of the South Dakota statutes relating to disciplinary action against attorneys. No argument has been made that the South Dakota Supreme Court failed to follow and fully comply with all statutory requirements in this regard. Regardless of the outcome, this case will affect only the Petitioner, and will have no bearing or effect on other individuals or on statutory or case law. There are no conflicting decisions as this is a case of first impression before the South Dakota Supreme Court on a singular set of facts applicable only to Petitioner. Finally, and of course most significantly, the Petition should be denied for the reason that the decision below was clearly correct. Petitioner was not and has not been denied procedural due process nor has there been any denial of any of his constitutional rights.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

KERMIT A. SANDE
Attorney General
State of South Dakota

MARVIN D. TRUHE
Assistant Attorney General
Counsel for Respondents

PROOF OF SERVICE

Marvin D. Truhe, one of the attorney's for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the _____ day of December, 1974, I served copies of the foregoing Respondent's Opposition to the Petition for a Writ of Certiorari upon Thomas J. Morris, Attorney at Law, 2060 North 14th Street, Arlington, Virginia, by mailing copies of such duly addressed to him with the proper postage prepaid.

MARVIN D. TRUHE, one of the
Attorneys for Respondent